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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 UNITED STATES OF AMERICA,
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11 Plaintiff,
12 v.
13 RICHARD ANTHONY ORTIZ,
14 Defendant.

Case No. CR12-62RSL

ORDER GRANTING
MOTION FOR EXTENSION
OF TIME

15 This matter comes before the Court on defendant's "Notice of Appeal" (Dkt. # 1575), in
16 which he requests an extension of time to file his appeal. Having reviewed the motion and the
17 balance of the record, the Court GRANTS defendant's request for an extension of time.

18 **I. Procedural Background**

19 On February 6, 2023, this Court entered an Order denying defendant's *pro se* motion for
20 a sentence reduction pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) and for appointment of counsel.
21 Dkt. # 1571. Under the Federal Rules of Appellate Procedure, defendant had 14 days after the
22 Order was entered to file a timely notice of appeal. *See* Fed. R. App. P. 4(b)(1)(A)(i). Thus, to
23 comply with the Rule, defendant needed to file his notice of appeal by February 20, 2023. *See*
24 Fed. R. App. P. 26(a)(1) (counting days). Defendant missed this deadline, filing his notice of
25 appeal on March 1, 2023. Dkt. # 1575.

26 Although not jurisdictional, the 14-day deadline established by Rule 4(b) is a mandatory
27 claim-processing rule that, if invoked by the government, requires dismissal of an appeal. *United*
28 *States v. Sadler*, 480 F.3d 932, 938-42 (9th Cir. 2007). The United States is unwilling to waive
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1 this deadline. *See* Dkt. # 1585 at 4. Accordingly, unless this deadline can be extended,
 2 defendant’s appeal must be dismissed as untimely. As the Court of Appeals lacks the authority
 3 to extend the time for filing a notice of appeal, Fed. R. App. P. 26(b)(2); *see also United States*
 4 *v. Arevalo*, 408 F.3d 1233, 1238-39 (9th Cir. 2005), this case was remanded from the Ninth
 5 Circuit back to this Court for the limited purpose of considering “whether appellant’s notice of
 6 appeal and attached declaration show excusable neglect or good cause for extending the time to
 7 file the notice of appeal,” Dkt. # 1591.

8 **II. Discussion**

9 The Court now turns to the question of whether an extension of time should be granted
 10 here. Upon a showing of “excusable neglect or good cause” this Court may extend the time for
 11 filing a notice of appeal “for a period not to exceed 30 days from the expiration of the time
 12 otherwise prescribed by this Rule 4(b).” Fed. R. App. P. 4(b)(4). “An analysis of ‘excusable
 13 neglect’ generally requires a court to analyze the four factors set out by the Supreme
 14 Court.” *See United States v. Navarro*, 800 F.3d 1104, 1109 (9th Cir. 2015) (citing *Pioneer Inv.*
 15 *Servs. Co. v. Brunswick Assocs. Ltd.*, 507 U.S. 380, 395 (1993)). These factors include danger of
 16 prejudice, length of the delay and its potential impact on judicial proceedings, reason for the
 17 delay, and whether the movant acted in good faith. *Pioneer*, 507 U.S. at 395. Alternatively,
 18 “‘good cause’ is a non-rigorous standard that has been construed broadly across procedural and
 19 statutory contexts.” *Navarro*, 800 F.3d at 1109 (quoting *Ahanchian v. Xenon Pictures, Inc.*, 624
 20 F.3d 1253, 1259 (9th Cir. 2010)).

21 Defendant argues that an extension of time is proper here because he did not receive the
 22 Court’s February 6 Order denying his motion for compassionate release until February 21, 2023
 23 – the day after the deadline for filing a notice of appeal had passed. Dkt. # 1575-1. Defendant
 24 alleges in a declaration attached to his notice of appeal that “through no fault of my own, the
 25 prison mailroom staff caused me to miss the deadline to file my appeal in a timely fashion.” *Id.*

26 In its motion to the Ninth Circuit requesting this limited remand, the government noted
 27 that defendant’s explanation for his late filing, “if proven, would likely establish good cause,”
 28 but emphasized that “the United States has not had an opportunity to attempt to confirm or

1 challenge” defendant’s claims. Dkt. # 1585 at 4. In the government’s memorandum to this
2 Court, the government explains that it “has gathered information relevant to Ortiz’s claim that
3 he did not receive the Court’s order until February 21, 2023,” and that this “information casts
4 doubt on Ortiz’s claim but does not refute it.” Dkt. # 1589 at 1. The government’s research
5 reveals that on average, mailings sent from the U.S. Attorney’s Office for the Western District
6 of Washington to inmates at the Federal Bureau of Prisons facility in Sheridan, Oregon take
7 about 2.7 days to reach the prison. Dkt. # 1590 at 1. It further reveals that defendant received the
8 government’s response to his motion for compassionate release on January 11, 2023 – two days
9 after it was filed on January 9, 2023. *Id.* at 2. However, this data – which relates to mail sent
10 from the U.S. Attorney’s Office rather than from this Court – has minimal bearing on the
11 question of when defendant received this Court’s June 6 Order. Significantly, the government
12 notes that it “usually stamps case filings that we mail to inmates as legal mail,” and
13 acknowledges that this Court’s February 6 “order was not marked as legal mail.” *Id.* Because the
14 Order was not marked as legal mail, Sheridan staff does not have a log of when they gave the
15 Order to defendant. *Id.* Nor does it appear that the government has any evidence of when the
16 Sheridan mailroom staff received the Order. *See generally* Dkt. # 1590. Finally, and perhaps
17 most critically, BOP officials state that “it would not be terribly unusual” for “a piece of mail
18 that is not marked as legal mail to take more than 14 days to reach a prisoner at Sheridan.” Dkt.
19 # 1590 at 2.

20 Given this additional information does not refute defendant’s claim, the Court finds that
21 defendant has demonstrated “excusable neglect” and “good cause.” As to excusable neglect, the
22 delay in filing the notice of appeal was fairly short – ten days past the deadline. Thus, the danger
23 of prejudice and potential impact on judicial proceedings is reasonably low. Furthermore,
24 defendant’s reason for delay – that he was not informed of the February 6 Order until after the
25 notice of appeal deadline had passed – is compelling and appears to be supported by the record.
26 Finally, there is no indication that defendant acted in bad faith. Because defendant’s notice of
27 appeal was filed within the 30-day extension period contemplated in Rule 4(b)(4), his notice of
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1 appeal is timely. *See United States v. Green*, 89 F.3d 657, 659-60 (9th Cir. 1996); *United States*
2 *v. Buzard*, 884 F.2d 475, 475-76 (9th Cir. 1989).

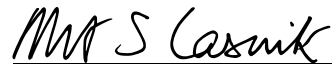
3 **III. Conclusion**

4 For all the foregoing reasons, defendant's motion for extension of time (Dkt. # 1575) is
5 GRANTED and his notice of appeal is timely.

6 The Clerk of Court is requested to send the Ninth Circuit a copy of this Order, given
7 defendant's pending appeal in that court docketed at No. 23-305.

8 IT IS SO ORDERED.

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10 DATED this 12th day of June, 2023.

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14 Robert S. Lasnik

15 United States District Judge
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